SABAH BANK BHD.

v.

BENJAMIN HJ. OMAR

HIGH COURT BORNEO, KOTA KINABALU
SYED AHMAD IDID JC
[CIVIL SUIT NO. 23-155-87]
14 NOVEMBER 1990

CIVIL PROCEDURE: *Whether rights under charge have to be executed prior to commencing legal action - Debtor cannot dictate terms - Debt satisfied.*

On 28 August 1986, the plaintiff bank, SBB, and the defendant B entered into an agreement whereby SBB granted B a general banking facility which was secured by way of a charge over the said lands. As a result of B's default, SBB commenced proceedings claiming the monies owed.

B contends that SBB had no cause of action against B until SBB had exercised their rights under the first charge created over the said lands; further that SBB had waived the sanctioned limit by allowing B to utilise the banking facility over and above the RM250,000 limit. B also denied that it received notice of interest accrued. B's Counsel argued that the cases cited by SBB have no relevance as this action is not against a guarantor but a principal debtor who charged his land, arguing that the security has not been disposed of and that if the disposal were to take place after the Court decision, there would be no way of knowing the amount to be realised.

SBB said that several attempts to auction off the said lands had been unsuccessful and contended that a creditor cannot be forced by a debtor to choose the method of enforcement of security. They contend that cases which decided that guarantors have no right to insist that the lender should realise the property charged first are also applicable in cases where the defendant is the actual borrower.

Held:

[1] Unlike the *Lesco* case, here there is only one Court having to determine if SBB's claim can be granted after failure to auction the said land on occasions.

[2] The Court adopted the proposition stated in *Ewart v. Latta* and held that until the debtor discharged his liability, he has no right to dictate any terms or prescribe any duty on his creditor and a creditor cannot be limited with regard to the course of legal action which has been given to him by the contract entered into between the parties.

[Plaintiff's application granted.]

Cases referred to:

Bank Bumiputra Malaysia Bhd. v. Esah Binti Abdul Ghani [1986] 1 MLJ 16
Ewart v. Latta [1865] 4 Macq 983
Lesco Development Corp. Sdn. Bhd. v. Malaysia Building Society Bhd. [1988] 2 MLJ 184
Re Tosrin Bin Jarnanthi Ex parte Equity Finance Corporation Berhad [1989] 2 CLJ (Rep) 587
United Asian Bank Berhad v. Hong Huat Realty (M) Sdn. Bhd. [1988] 2 CLJ (Rep) 511

For the plaintiffs - Raymond K.K. Wong; M/s. Nicholas Fung Tokuzip & Co.
For the defendant - Sugumar Balakrishnan; M/s. Sugumar & Co.

JUDGMENT

Syed Ahmad Idid JC:

On 24 January 1987, the plaintiffs claimed against the defendant:

(i) The sum of RM306,071.96;

(ii) agreed interest at the rate of 10% per annum or such other rate of interest as fixed by the plaintiffs' firm from time to time from 31 December 1986 to the date of judgment;

(iii) statutory interest at the rate of 8% per annum from the date of judgment until payment;

(iv) all fees, expenses incurred by the plaintiffs in enforcing payment in this action including solicitors fees on a solicitor and client basis;

(v) any other just relief; and

(vi) costs.

The plaintiffs are duly licensed bankers in Malaysia and they operate a branch at 4, 5 & 6, Block K, Sinsuran Complex, W.D.T. No. 132, 88999 Kota Kinabalu, in the State of Sabah, Malaysia.

By an agreement in writing dated 28 August 1980 between the plaintiffs and the defendant, the plaintiffs granted the defendant a general banking facility.

The defendant averred that in the event of a breach of the agreement (which was denied), the plaintiffs had no cause of action against the defendant until the plaintiffs had exercised their rights under the 1st charge created over the defendant's lands and that plaintiffs had waived the sanctioned limit by allowing the defendant to utilize the banking facility over and above the RM250,000 limit. Thirdly, defendant denied ever receiving notice of interest accrued.

Mr. Raymond K.K. Wong, for the plaintiffs, in his affidavit stated that plaintiffs did make several attempts to auction off the land held under Native Title Nos. 4939, 4940 and Field Register 1246 which were charged to the plaintiffs (and he annexed the Proclamations of Sale as Exhibits "RW.1". Such auctions had been earlier scheduled on (i) 11 July 1987; (ii) 10 October 1987; and (iii) 2 January 1988). There were no bidders at these auctions and consequently the charged lands remain unsold.

Plaintiffs' Counsel contended that the law is clear that a creditor cannot be forced by a debtor to choose the method of enforcement of his security. He cited (i) *Bank Bumiputra Malaysia Bhd. v. Esah binti Abdul Ghani* [1986] 1 MLJ 16; (ii) *Re Tosrin bin Jarnanthi Ex Parte Equity Finance Corporation Berhad* [1989] 2 CLJ (Rep) 587. Although these cited cases talked about guarantors having no right to insist that the lender should realise the property charged first, Counsel urged the Court on the analogy which can equally be drawn in our case where the defendant is the actual borrower.

Plaintiffs' Counsel explained that the excess over RM250,000 was caused by accrued interest. Exhibit "JC.3" was proof that the amount was overdrawn up to RM248,800 and thereafter additions of interest were recorded.

As for notices, plaintiffs maintained that at all material times they had sent monthly statements of accounts to the defendant who knew of the account status (JC.4).

Mr. Sugumar for defendant submitted only that the cases cited by plaintiffs had no relevance to our present matter as this action is not against the guarantor but against the principal debtor who charged his land. He argued that the security has not been disposed of and if the disposal is after decision of this case then there is no way of knowing the amount to be

realised. He stressed that there are two simultaneous actions. Mr. Sugumar, in support of his arguments, cited *Lesco Development Corp. Sdn. Bhd. v. Malaysia Building Society Bhd*. [1988] 2 MLJ 184 in which it was held:

(1) It is undesirable to allow a situation where two different Courts would try and determine the same issues arising between the same parties relating to the same matter;

(2) in this case the hearing of the foreclosure proceedings should have been postponed until the final disposal of the claim on the debt;

(3) the order of sale should be set aside and the hearing of the foreclosure application be dealt after final disposal of the claim on the debt.

The judgment was based on the fact that as the Building Society had chosen to sue *Lesco* in the Commercial Division before filing the originating summons while there was already default judgment in the suit and the application to set aside the default judgment was still pending, the Supreme Court opined that the hearing of the originating summons should have been postponed until final disposal of the suit in the Commercial Division.

Conclusion

Both Counsel (for plaintiffs and defendant) had stated correctly that this is a case of the banker going after his principal customer. The cases of *Bank Bumiputra Malaysia Bhd. v. Esah binti Abdul Ghani* [1986] 1 MLJ 16 and *Re Tosrin Bin Jarnanthi, Ex Parte Equity Finance Corp. Bhd.* [1989] 2 CLJ (Rep) 587 are clearly cases where bankers/financiers went against guarantors. The case of *Lesco Development Corp. Sdn. Bhd. v. Malaysia Building Society Bhd.* which relates to the financier who lent RM5 million to the chargor, the principal customer, would appear to be helpful.

However, the facts in the instant case here differ in that whereas in *Lesco's* there were "two different Courts (who) would try and determine the same issues arising between the same parties relating to the same subject matter", here we have this Court having to determine if the plaintiffs' claim can be granted after failure to auction defendant's securities on three occasions. It was held in *United Asian Bank Berhad v. Hong Huat Realty (M) Sdn. Bhd.* [1988] 2 CLJ (Rep) 511 that:

> The enforcement by the petitioner of the alternative remedy does not amount to a representation that it would not resort to other remedies open to it.

Surely plaintiffs cannot be forced to wait and wait until the land can be sold at an auction. Three previous auctions had not succeeded. The claims against the defendant increase day by day until he settles it. By 31 December 1986, the outstanding inclusive of interest was RM306,071.90. Three years and 10 months have since passed.

It is not urged upon this Court and neither will this Court comment on how the parties can solve their problem, for example, by reducing the reserved prices to levels which can attract bidders (in which case there may be the possibility of the customer/chargor instituting actions against the bank for disposing of the lands to his disadvantage and on other grounds) or by private treaty sales. Oftentimes there are no bidders at auctions because there is a superstition that such lands bring bad luck. It is pertinent to remind ourselves "that we are not concerned with moral but legal problem." (per Lee Hun Hoe CJ (Borneo) in *Bank Bumiputra Malaysia Berhad v. Esah Binti Abdul Ghani*).

The Court is not concerned with these extraneous matters but with the facts and the laws as

expounded by both Counsel. Accordingly the Court finds that:

(i) While the *Lesco's* judgment by the Supreme Court is illuminating, this instant case is not on all fours with it;

(ii) the law relevant to this matter was amply stated by Lord Westbury in *Ewart v. Latta* [1865] 4 Macq 983, 987:

> Until the debtor has discharged himself of his liability, until he has fulfilled his own contract, he has no right to dictate any terms, to prescribe any duty, or to make any demand on his creditor. The creditor must be left in possession of the whole of the remedies which the original contract gave him, and he must be left unfettered and at liberty to exhaust those remedies, and he cannot be required to put any limitation upon the course of legal action given by him by his contract by any person who is still his debtor, except upon the terms of that debt being completely satisfied.

And so I grant the Order-in-Terms of the plaintiffs' application.

Also found at [1991] 2 CLJ 1205